

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES

v.

EUGENE PARKER

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CRIMINAL ACTION

NO. 05-CR-702

SURRICK, J.

APRIL 14, 2006

MEMORANDUM & ORDER

Presently before the Court is the Government's Motion In Limine To Use Defendant's Prior Convictions (Doc. No. 20). For the following reasons, the Motion is denied.

I. BACKGROUND

Defendant Eugene Parker is charged with two counts of possession with intent to distribute cocaine, two counts of possession with intent to distribute heroin, and one count each of possession with intent to distribute cocaine base, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a convicted felon. These charges arise out of two arrests. On April 25, 2005, at approximately 11:30 a.m., Philadelphia Police Officer Dennis Lopez and three other officers were driving in an unmarked police car on Lancaster Avenue near 42nd Street in Philadelphia. This area was known to the officers to be a high drug-trafficking area. Officer Lopez observed Defendant on the street, talking to another man. After taking money from the other man's hand, Defendant placed the money in his pocket and then took out a small bag from the same pocket. Defendant then took a small object from the bag and handed it to the other man, who walked away. Defendant was stopped by Lopez and frisked. As a result of the frisk, the police officers found packets of cocaine and heroin, and \$988 cash in the

same pant pocket as the one that the officers had seen Defendant reach into during the transaction. Defendant was charged with drug trafficking offenses and released on bail pending trial.

On August 28, 2005, at approximately 5:30 a.m., Philadelphia Police Officer Sean Lemard was driving a marked police car when he received a radio call about a shooting in the area of 52nd and Jefferson Streets. Lemard drove to that area, where he saw Defendant standing alone on the corner about a half block away from 52nd and Jefferson Streets. The officer pulled up to Defendant and asked him whether he saw or heard the shooting. Defendant was holding a small address book in his hand. He turned away from Lemard and, as he did so, a small yellow-tinted packet containing a white substance fell out of the book to the ground. Defendant then attempted to conceal the packet with his foot. Lemard believed that the packet contained narcotics. The officer exited his car, grabbed Defendant by the hand, and asked him if he had any guns or drugs on him. Defendant responded by informing Lemard that he had a gun in his waistband. Lemard frisked Defendant, felt a bulge in the front waistband, and recovered a loaded .380 semi-automatic firearm. Defendant also shook the book in his hand in response to Lemard's question, causing multiple packages to fall from the book. Lemard seized the packets from the ground and the book from Defendant. Inside the book were additional packets of narcotics. Lemard recovered \$1,170 cash from Defendant's person. Defendant was placed under arrest and taken into custody.

The Government has moved for the admission of Defendant's prior convictions for impeachment purposes under Federal Rule of Evidence 609(a)(1).

II. DISCUSSION

Rule 609(a)(1) provides, that, with respect to a crime “punishable by death or imprisonment in excess of one year[,] . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused” Fed. R. Evid. 609(a)(1). The Government seeks to admit Defendant’s three convictions for a felony controlled substance violation from January 4, 2002 in the Court of Common Pleas of Philadelphia County. (Doc. No. 21.) According to the Government, these prior drug convictions have probative value for impeachment purposes. Specifically, the Government contends that with a proper limiting instruction to the jury, these convictions relate to Defendant’s credibility. (Doc. No. 20 at 5-6.)

In determining whether a prior conviction is admissible under Rule 609(a)(1), we consider the following factors: “(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness’s testimony to the case; (4) the importance of the credibility of the defendant.” *Gov’t of Virgin Islands v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982). With respect to the first factor, some courts have recognized that a prior drug conviction may reflect on the credibility of a defendant. *See, e.g., United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977) (“[T]he District Judge in his discretion was entitled to recognize that a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie. From this he could rationally conclude that such activity in a witness’ past is probative on the issue of credibility.”); *see also United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1996) (“Prior convictions for drug offenses are probative of veracity”); *United States v. Borrone*, No.

Crim. 97-00224-01, 1997 WL 786436, at *3 (E.D. Pa. Dec. 3, 1997) (prior drug conviction admissible under Rule 609(a)(1) in trial for drug possession).

In this case, however, the prior convictions which the Government seeks to use are three recent felony convictions for possession with the intent to distribute controlled substances. This is the same crime that Defendant is charged with here. Because the convictions involve the same type of conduct as the present charges, “the risk that a jury may assume guilt in the instant offense based upon past convictions is enhanced.” *United States v. Maisonneuve*, 954 F. Supp. 114, 117 (D. Vt. 1997). Indeed, “where . . . the prior conviction is sufficiently similar to the crime charged, there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury’s fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again.” *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985). We also note that these prior convictions are of recent vintage and that they reflect that between 1999 and 2001, Defendant was engaged in a course of conduct that involved drug trafficking. Thus, the prejudicial effect of these convictions is substantial. *See United States v. Sanders*, 964 F.2d 295, 298 (4th Cir. 1992) (defendant’s prior convictions involving the exact type of conduct for which defendant was on trial are inadmissible under Rule 609(a)(1) “because of the high likelihood of prejudice that accompanies the admission of such similar prior convictions”). Moreover, counsel has advised the Court that Defendant’s testimony is crucial to his defense. This assertion appears to be borne out by the facts giving rise to the present charges. Accordingly, we will deny the Government’s Motion without prejudice, to revisit the issue if appropriate. *See Maisonneuve*, 954 F. Supp. at 117; *see also United States v. Rivera*, No. Crim. A. 97-425, 1998 WL 42250, at *2 (E.D. Pa. Jan. 9, 1998) (evidence of prior drug conviction

admissible under Rule 609(a)(1) to rebut defendant's testimony that he had "no habit" and "no vices").

An appropriate Order follows.

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ORDER

AND NOW, this 14th day of April, 2006, upon consideration of the Government's Motion In Limine To Use Defendant's Prior Convictions (Doc. No. 20) , and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S/ R. Barclay Surrick
U.S. District Court Judge